

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

RAUL ESCARCEGA,  
Petitioner,

v.

BEN CURRY, warden,  
Respondent.

No. C 06-3693 SI (pr)

**ORDER DENYING HABEAS  
PETITION**

**INTRODUCTION**

Raul Escarcega, an inmate at the Correctional Training Facility in Soledad, filed this pro se action seeking a writ of habeas corpus under 28 U.S.C. § 2254. This matter is now before the court for consideration of the merits of the petition. For the reasons discussed below, the petition will be denied.

**BACKGROUND**

Escarcega was convicted in Los Angeles County Superior Court of kidnapping for the purpose of robbery and was found to have used a weapon in the commission of the crime. He also was found to have suffered three prior convictions for sentencing purposes: a 1982 conviction for assault with intent to commit rape, a 1981 voluntary manslaughter conviction, and a 1977 robbery conviction. On March 16, 1984, he was sentenced to state prison for a term of life plus ten years. Resp. Exh. 1. His habeas petition does not challenge his conviction but instead challenges a June 3, 2004 decision of the Board of Prison Terms, now known as the Board of Parole Hearings ("BPH"), that found him not suitable for parole. The 2004 hearing was Escarcega's fifth parole hearing, and was conducted at a time when he was 21 calendar years

1 into his life sentence.

2 The BPH identified the circumstances of the commitment offense, Escarcega's prior  
3 criminality and unstable social history, as well as his unrealistic parole plans as the reasons for  
4 the determination that he was not suitable for parole and would pose an unreasonable risk of  
5 danger to society or a threat to public safety if released from prison. Resp. Exh. 3 (reporter's  
6 transcript of June 3, 2004 BPH hearing (hereinafter "RT")) at 53-55. The specifics regarding  
7 the crime and the circumstances supporting the finding of unsuitability are described in the  
8 Discussion section later in this order.

9 Escarcega sought relief in the California courts. He filed a habeas petition in the Los  
10 Angeles County Superior Court, where it was denied in a reasoned decision. Resp. Exh. 4.  
11 The California Court of Appeal denied his habeas petition in a short, conclusory order. Resp.  
12 Exh. 5. The California Supreme Court summarily denied his habeas petition. Resp. Exh. 6.

13 Escarcega then filed his federal petition for a writ of habeas corpus. The court found  
14 cognizable a due process claim that there was not sufficient evidence to support the decision.  
15 Respondent filed an answer and Escarcega filed a traverse. The matter is now ready for a  
16 decision. The court earlier indicated that it intended to wait for guidance from the anticipated  
17 en banc decision in Hayward v. Marshall, 512 F.3d 536 (9th Cir.), reh'g en banc granted, 527  
18 F.3d 797 (9th Cir. 2008), and further briefing thereafter. Although much time has passed,  
19 Hayward remains pending in the appellate court and it is unknown to this court when the  
20 decision will be released. The court will proceed to decide the merits of the petitions without  
21 the benefit of the Hayward decision.

## 22 23 JURISDICTION AND VENUE

24 This court has subject matter jurisdiction over this habeas action for relief under 28  
25 U.S.C. § 2254. 28 U.S.C. § 1331. This action is in the proper venue because the challenged  
26 action concerns the execution of the sentence of a prisoner housed at a prison in Monterey  
27 County, within this judicial district. 28 U.S.C. §§ 84, 2241(d).

## EXHAUSTION

Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings either the fact or length of their confinement are required first to exhaust state judicial remedies, either on direct appeal or through collateral proceedings, by presenting the highest state court available with a fair opportunity to rule on the merits of each and every claim they seek to raise in federal court. See 28 U.S.C. § 2254(b), (c). The parties do not dispute that state court remedies were exhausted for the claim asserted in the petition.

## STANDARD OF REVIEW

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); see Williams (Terry) v. Taylor, 529 U.S. 362, 409-13 (2000). Section 2254(d) applies to a habeas petition from a state prisoner challenging the denial of parole. See Sass v. California Board of Prison Terms, 461 F.3d 1123, 1126-27 (9th Cir. 2006).

## DISCUSSION

### A. Due Process Requires That Some Evidence Support a Parole Denial

A California prisoner with a sentence of a term of life with the possibility of parole has a protected liberty interest in release on parole and therefore a right to due process in the parole suitability proceedings. See Sass, 461 F.3d at 1127-28; Board of Pardons v. Allen, 482 U.S. 369 (1987); Greenholtz v. Inmates of Nebraska Penal & Corr. Complex, 442 U.S. 1 (1979); Cal.

1 Penal Code § 3041(b).

2 A parole board's decision satisfies the requirements of due process if "some evidence"  
3 supports the decision. Sass, 461 F.3d at 1128-29 (adopting some evidence standard for  
4 disciplinary hearings outlined in Superintendent v. Hill, 472 U.S. 445, 454-55 (1985)). "To  
5 determine whether the some evidence standard is met 'does not require examination of the entire  
6 record, independent assessment of the credibility of witnesses, or weighing of the evidence.  
7 Instead, the relevant question is whether there is any evidence in the record that could support  
8 the conclusion reached'" by the BPH. Sass, 461 F.3d at 1128 (quoting Superintendent v. Hill,  
9 472 U.S. at 455-56). The "some evidence standard is minimal, and assures that 'the record is not  
10 so devoid of evidence that the findings of the . . . board were without support or otherwise  
11 arbitrary.'" Id. at 1129 (quoting Superintendent v. Hill, 472 U.S. at 457). The some evidence  
12 standard of Superintendent v. Hill is clearly established law in the parole context for purposes  
13 of § 2254(d). Sass, 461 F.3d at 1129. As a matter of state law, the decisionmaker's decision  
14 must also satisfy the "some evidence" standard of review. See In re Lawrence, 44 Cal. 4th 1181,  
15 1191 (Cal. 2008) (state court "standard of review properly is characterized as whether 'some  
16 evidence' supports the conclusion that the inmate is unsuitable for parole because he or she  
17 currently is dangerous"); In re Rosenkrantz, 29 Cal. 4th 616, 676-77 (Cal. 2002).

18 A critical issue in parole denial cases concerns the parole authority's use of evidence  
19 about the commitment offense that led to the conviction. Three Ninth Circuit cases provide the  
20 guideposts for applying the Superintendent v. Hill some evidence standard on this point: Biggs  
21 v. Terhune, 334 F.3d 910 (9th Cir. 2003), Sass, 461 F.3d 1123, and Irons v. Carey, 505 F.3d 846  
22 (9th Cir. 2007).<sup>1</sup> Biggs explained that the value of the criminal offense fades over time as a  
23 predictor of parole suitability: "The Parole Board's decision is one of 'equity' and requires a  
24 careful balancing and assessment of the factors considered. . . . A continued reliance in the  
25 future on an unchanging factor, the circumstance of the offense and conduct prior to  
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27 <sup>1</sup>En banc review is now pending in a fourth case regarding the some evidence standard,  
28 Hayward v. Marshall, 512 F.3d 536 (9th Cir.), reh'g en banc granted, 527 F.3d 797 (9th Cir.  
2008). The order granting en banc review states that the panel opinion is of no precedential  
value.

1 imprisonment, runs contrary to the rehabilitative goals espoused by the prison system and could  
2 result in a due process violation.” Biggs, 334 F.3d at 916-17. Biggs upheld the initial denial of  
3 a parole release date based solely on the nature of the crime and the prisoner’s conduct before  
4 incarceration, but cautioned that “[o]ver time . . . , should Biggs continue to demonstrate  
5 exemplary behavior and evidence of rehabilitation, denying him a parole date simply because  
6 of the nature of Biggs’ offense and prior conduct would raise serious questions involving his  
7 liberty interest in parole.” Id. at 916. Next came Sass, which criticized the Biggs statements as  
8 improper and beyond the scope of the dispute before the court: “Under AEDPA it is not our  
9 function to speculate about how future parole hearings could proceed.” Sass, 461 F.3d at 1129.  
10 Sass determined that the parole board is not precluded from relying on unchanging factors such  
11 as the circumstances of the commitment offense or the petitioner’s pre-offense behavior in  
12 determining parole suitability. See id. (commitment offenses in combination with prior offenses  
13 provided some evidence to support denial of parole at subsequent parole consideration hearing).  
14 Sass also put to rest any idea from Biggs that the commitment crime and pre-offense behavior  
15 only support the initial denial of parole. Irons determined that due process was not violated by  
16 the use of the commitment offense and pre-offense criminality to deny parole for a prisoner 16  
17 years into his 17-to-life sentence. Irons emphasized that all three cases (Irons, Sass and Biggs)  
18 in which the court had “held that a parole board’s decision to deem a prisoner unsuitable for  
19 parole solely on the basis of his commitment offense comports with due process, the decision  
20 was made before the inmate had served the minimum number of years required by his sentence.”  
21 Irons, 505 F.3d at 853.<sup>2</sup> Interpreting this statement from Irons to suggest that the offense can  
22 only be relied on until the minimum number of years has been reached would suffer the same  
23 problem that Sass identified in Biggs: it is not the holding of the case. The dicta in Biggs and  
24 Irons are speculative and do not determine when a denial of parole based solely upon the  
25 commitment offense or pre-offense behavior violates due process. Neither logic nor Irons

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27 <sup>2</sup>Interestingly, Irons was referring the actual number of years the inmate had been in  
28 prison and not the fictional number of years based on reductions for time credits. In Irons, the  
inmate had been in custody 16 years on his 17-to-life sentence, having been convicted in 1985  
and challenging a 2001 parole decision.

1 compels a decision that such reliance must cease when the prisoner reaches the minimum  
2 number of years in his sentence, such as the fifteenth year of a 15-to-life sentence.

3       The upshot of these three cases is that the BPH can look at immutable events, such as the  
4 nature of the conviction offense and pre-conviction criminality, to predict that the prisoner is not  
5 currently suitable for parole even after the initial denial (Sass), but the weight to be attributed  
6 to those immutable events should decrease over time as a predictor of future dangerousness as  
7 the years pass and the prisoner demonstrates favorable behavior (Biggs and Irons). Sass did not  
8 dispute the principle that, other things being equal, a crime committed 50 years ago is less  
9 probative of a prisoner's current dangerousness than one committed 10 years ago. Not only does  
10 the passage of time in prison count for something, exemplary behavior and rehabilitation in  
11 prison count for something according to Biggs and Irons. Superintendent v. Hill's standard  
12 might be quite low, but it does require that the decision not be arbitrary, and reliance on only the  
13 facts of the crime might eventually make for an arbitrary decision.<sup>3</sup>

14       What little guidance has come from the Supreme Court suggests that judicial review  
15 should be extremely deferential to the original decision-maker in the parole context. In addition  
16 to the very low evidentiary standard that Superintendent v. Hill imposes, other Supreme Court  
17 comments suggest that the judiciary should be quite mindful of the subjective and predictive  
18 nature of a parole board's decision. See Greenholtz, 442 U.S. at 13. "No ideal, error-free way  
19 to make parole-release decisions has been developed; the whole question has been and will  
20 continue to be the subject of experimentation involving analysis of psychological factors  
21 combined with fact evaluation guided by the practical experience of decisionmakers in  
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24       <sup>3</sup>The California Supreme Court recently weighed in on the use of the commitment crime  
25 to deny parole in the companion cases of In re Lawrence, 44 Cal. 4th 1181 (Cal. 2008), and In  
26 re Shaputis, 44 Cal. 4th 1241 (Cal. 2008). The court explained that where "evidence of the  
27 inmate's rehabilitation and suitability for parole under the governing statutes and regulations is  
28 overwhelming, the only evidence related to unsuitability is the gravity of the commitment  
offense, and that offense is both temporally remote and mitigated by circumstances indicating  
the conduct is unlikely to recur, the immutable circumstance that the commitment offense  
involved aggravated conduct does not provide 'some evidence' inevitably supporting the ultimate  
decision that the inmate remains a threat to public safety." Lawrence, 44 Cal. 4th at 1191  
(emphasis in source). Applying that rule, the court determined that there was not some evidence  
to deny parole in Lawrence but that there was some evidence to deny parole in Shaputis.

1 predicting future behavior. Our system of federalism encourages this state experimentation."

2 Id.; see also id. at 8.

3 Past criminal conduct is not some arbitrary factor like eye color that has nothing to do  
4 with present dangerousness. Recidivism concerns are genuine. See Ewing v. California, 538  
5 U.S. 11, 26 (2003) (O'Connor J.) (noting a report stating that over 60% of violent offenders were  
6 arrested again within three years of their release). California's parole scheme does not offend  
7 due process by allowing the BPH to predict that an inmate presents a present danger based on  
8 a crime he committed many years ago.

9 Having determined that there is a due process right, and that some evidence is the  
10 evidentiary standard for judicial review, the next step is to look to state law because that sets the  
11 criteria to which the some evidence standard applies. One must look to state law to answer the  
12 question, "'some evidence' of what?"

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14 B. State Law Standards For Parole For Kidnappers In California

15 California uses indeterminate life sentences for persons convicted of kidnapping for  
16 robbery. See Cal. Penal Code § 209(b). California's parole scheme described below provides  
17 that a release date normally must be set unless various factors exist, but the "unless" qualifier  
18 is substantial.

19 A BPT panel meets with an inmate one year before the prisoner's minimum eligible  
20 release date "and shall normally set a parole release date. . . . The release date shall be set in a  
21 manner that will provide uniform terms for offenses of similar gravity and magnitude in respect  
22 to their threat to the public, and that will comply with the sentencing rules that the Judicial  
23 Council may issue and any sentencing information relevant to the setting of parole release  
24 dates." Cal. Penal Code § 3041(a). Significantly, that statute also provides that the panel "shall  
25 set a release date unless it determines that the gravity of the current convicted offense or  
26 offenses, or the timing and gravity of current or past convicted offense or offenses, is such that  
27 consideration of the public safety requires a more lengthy period of incarceration for this  
28 individual, and that a parole date, therefore, cannot be fixed at this meeting." Cal. Penal Code



1 § 3041(b).

2 One of the implementing regulations, 15 Cal. Code Regs. § 2281, allows for consideration  
3 of a wide range of information in determining suitability, see § 2281(b), and lists circumstances  
4 tending to show suitability and circumstances tending to show unsuitability, § 2281(c) and (d).<sup>4</sup>  
5 The regulation also provides that "[t]he panel shall first determine whether a prisoner is suitable  
6 for release on parole. Regardless of the length of time served, a life prisoner shall be found  
7 unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an  
8 unreasonable risk of danger to society if released from prison." 15 Cal. Code Regs. § 2281(a).

9 The regulations contain a matrix of suggested base terms for several categories of crimes.  
10 See 15 Cal. Code Regs. § 2282. For example, for kidnapping for robbery or ransom, the matrix  
11 of base terms ranges from the low of 8, 10, or 12 years to a high of 13, 15, or 17 years,  
12 depending on some of the facts of the crime.<sup>5</sup> Some prisoners estimate their time to serve based  
13 only on the matrix. However, going straight to the matrix to calculate the sentence puts the cart  
14 before the horse because it ignores critical language in the relevant statute and regulations that  
15 requires him first to be found suitable for parole. The statutory scheme places individual  
16 suitability for parole above a prisoner's expectancy in early setting of a fixed date designed to

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18 <sup>4</sup>The listed circumstances tending to show unsuitability for parole are the nature of the  
19 commitment offense, i.e., whether the prisoner committed the offense in "an especially heinous,  
20 atrocious or cruel manner;" the prisoner has a previous record of violence; the prisoner has an  
21 unstable social history, the prisoner previously engaged in a sadistic sexual offense, the prisoner  
22 has a lengthy history of severe mental problems related to the offense; and serious misconduct  
23 while in prison. 15 Cal. Code Regs. § 2281(c). The listed circumstances tending to show  
24 suitability for parole are the absence of a juvenile record, stable social history, signs of remorse,  
a stressful motivation for the crime, whether the prisoner suffered from battered woman's  
syndrome, lack of criminal history, the present age reduces the probability of recidivism, the  
prisoner has made realistic plans for release or developed marketable skills, and positive  
institutional behavior. 15 Cal. Code Regs. § 2281(d). The circumstances listed as tending to  
show unsuitability and suitability "are set forth as general guidelines; the importance attached  
to any circumstance or combination of circumstances in a particular case is left to the judgment  
of the panel." 15 Cal. Code Regs. § 2281(c) and (d).

25 <sup>5</sup>One axis of the matrix concerns the kind of harm done to the victim and the other axis  
26 of the matrix concerns the circumstances of the kidnapping. The choices on the axis for the  
27 harm to the victim include no/minor harm, victim sexually or otherwise seriously assaulted,  
28 victim suffered major injuries, or victim died. The choices on the axis for the circumstances of  
the kidnapping are minor movement, extensive movement, victim taken hostage, and intricate  
prior planning for the crime. 15 Cal. Code Regs. § 2282(c).



1 ensure term uniformity. In re Dannenberg, 34 Cal. 4th 1061, 1070-71 (Cal. 2005). Under state  
 2 law, the matrix is not reached unless and until the prisoner is found suitable for parole. See id.  
 3 at 1070-71; 15 Cal. Code Regs. § 2282(a) ("[t]he panel shall set a base term for each life prisoner  
 4 who is found suitable for parole").

5 The "Penal Code and corresponding regulations establish that the fundamental  
 6 consideration in parole decisions is public safety . . . [T]he core determination of 'public safety  
 7 under the statute and corresponding regulations involves an assessment of an inmate's current  
 8 dangerousness." Lawrence, 44 Cal. 4th at 1205 (emphasis in source).<sup>6</sup>

### 9 10 C. Some Evidence Supports The BPH's Decision In Escarcega's Case

#### 11 1. The BPH's Decision

12 The BPH identified the circumstances of the commitment offense, Escarcega's prior  
 13 criminality and unstable social history, as well as his unrealistic parole plans as the reasons for  
 14 the determination that he was not suitable for parole and would pose an unreasonable risk of  
 15 danger to society or a threat to public safety if released from prison. RT 53-55. The BPH also  
 16 found that Escarcega needed "to continue in self-help to face, discuss, understand and cope with  
 17 stress in a non-destructive manner." RT 55.

18 Commitment Offense: The crime was described in a report the BPH had available to it  
 19 at the hearing:

20 [T]he prisoner, armed with a firearm, approached the victim from the driver's side of the  
 21 vehicle. His crime partner, Salazar, approached the vehicle on the passenger side. The  
 22 victim was ordered into the back seat of the car. The victim was stopped at the  
 intersection of Sunset and Figueroa in the City of Los Angeles. This was about 2:30 in

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23  
 24 <sup>6</sup>The California Supreme Court's determination in Lawrence that state law requires the  
 25 parole authority to determine whether the inmate is unsuitable for parole because he currently  
 is dangerous is binding in this federal habeas action. See Hicks v. Feiock, 485 U.S. 624, 629-30  
 26 (1988). However, Lawrence does not govern this court's analysis in every respect. This court  
 is not bound by the discussion in Lawrence (see footnote 4, supra) as to the evaluation of the  
 27 commitment offense in determining whether the parole applicant currently is dangerous. As to  
 that point, Lawrence is persuasive authority, while the Ninth Circuit's holdings in Sass, Biggs,  
 28 and Irons are binding authority. Also, Lawrence's determination that "some evidence" is the  
 proper standard of judicial review, 44 Cal. 4th at 1211-12, does not bind this court because it is  
 a state court decision and, in any event, was not determining the standard required by the federal  
 constitution.

1 the morning. Then the prisoner drove the victim's vehicle with the crime partner in it and  
2 had the victim in the back seat down the street. The victim was robbed of several  
3 cassettes and a wallet containing 30 dollars. They also took some work shoes and tools,  
4 a jacket. Then the victim was told to leave. The victim drove away in his vehicle, went  
5 down the street, parked the vehicle, went to a telephone to call the police, and while he  
6 was there the prisoner and his crime partner drove by in another car. The victim hid.  
7 Then a citizen came to the aid of the victim. They went back to the car and then they  
8 noted the prisoner's license number of the car that he was in and they went back to the  
9 car. The police were already there. They gave him the license number and then another  
10 time when the prisoner and his crime partner drove by the crime scene and he was  
11 subsequently arrested.

12 RT 10-11. Escarcega denied his involvement in the kidnapping. See RT 11, 50.

13 The BPH determined that the kidnapping was "carried out in an especially violent and  
14 callous manner. The offense was carried out in a dispassionate and calculated manner." RT 53.

15 Prior criminality and unstable social history: The BPH also relied heavily on Escarcega's  
16 prior escalating criminality and unstable relationships in reaching its decision. The record before  
17 the BPH included the probation officer's report that listed Escarcega's extensive record of  
18 juvenile delinquency and criminal activity, starting with being picked up by police when he was  
19 just ten years old, when his mother called police because she thought he had been sniffing glue  
20 for several days and she was unable to control him. Resp. Exh. 2, p. 5. "He joined a juvenile  
21 gang at age 10, participated in gang activities. At age 10 began his abuse of alcohol and PCP.  
22 He admitted being a heavy drinker of alcohol. His adult record consists of two, an arrest for  
23 robbery and burglary, for which he was sent to the Youth Authority. When he was released he  
24 was arrested for a voluntary manslaughter and put back in the Youth Authority. He was released  
25 and then he was arrested for . . . assault with intent to commit rape. Then shortly after that he  
26 was involved in the commitment offense." RT 54.

27 There was ample support for the BPH's conclusion that Escarcega had a "record of violent  
28 and assaultive behavior" that was escalating. RT 54. In the burglary for which he was convicted  
in 1976, he "was armed with a shotgun and turned toward one of the officers. The officer fired  
once at the defendant, missing him, and the defendant dropped the gun and attempted to flee."  
Resp. Exh. 2, p. 7. As to the voluntary manslaughter conviction, he originally had been charged  
with murder for an incident in which he was "one of several [persons] who attacked, stomped,  
knifed and shot a victim in a gang retaliatory action outside of a local bar." Id at 8; see RT 11-

1 13. The assault with intent to commit rape was committed less than a week after he was released  
2 from prison after serving the voluntary manslaughter sentence. See RT 14. He was on probation  
3 for the assault crime when he committed the kidnapping that led to his life sentence.

4 His substance abuse history was significant. Escarcega was a heavy drinker with  
5 problems controlling his drinking when he was arrested for the kidnapping. He had been  
6 drinking since about age 10. RT 15. He also had experimented with marijuana, and used PCP.  
7 RT 15. He also had joined the Alpine street gang when he was about 11. He had, however,  
8 joined AA while in prison. RT 24-25.

9 Parole plans: The BPH determined that Escarcega "lacks realistic parole plans. He's not  
10 sure where he wants to live. The letter from his mother doesn't specifically indicate he can live  
11 with her. He has no job offer and he's not sure where he wants to work. He has sent out letters,  
12 but has not received responses and knows locations are quite a distance from where he  
13 anticipates he may live if he lives with his mother." RT 54-55.

14 These findings had support in the record. Escarcega planned to live with his mother, in  
15 the same area as the kidnapping took place, although her letter did not actually invite him to live  
16 with her. RT 36-37. He also had a letter from the Miracle House, but that did not offer housing  
17 and only explained what the program would be if he was accepted into it. RT 37. He had no  
18 written job offer, and several of the inquiries he had made were to employers far away from  
19 where he intended to live, and apparently would have involved impractical commutes. RT 39.  
20 The BPH did note that he had letters of support. RT 41-42.

21 Other information: In addition to the foregoing information, the BPH also reviewed  
22 more positive details in Escarcega's prison record. Escarcega had generally positive post-  
23 conviction factors, except that he had accrued a serious disciplinary history early on in his  
24 incarceration. He had received good work reviews, had obtained his GED, and had completed  
25 some vocational programs (although he lacked the necessary documentation of the completion  
26 of some programs). He had participated in AA in 1998-2004. He also had participated in  
27 various self-help groups and programs for personal betterment, as well as some special projects.  
28 Escarcega had a generally favorable psychological evaluation, RT 32. Escarcega stated that,

1 with age, he had learned to avoid situations with potential for trouble. See RT 34.

2 Not all his post-conviction factors were positive, however. Escarcega had received eight  
3 CDC-115 rule violation reports, although the most recent one was in December 1991. The  
4 CDC-115s he had received were, according to one of the commissioners, were for serious  
5 offenses, such as being part of a conspiracy to steal by embezzlement from the inmate trust fund  
6 and the inmate welfare fund, RT 28, that was ultimately reduced to an administrative write-up,  
7 RT 29. In November 1984, he was found in possession of a double-edge razor blade in his cell.  
8 RT 29-30. In October 1984, an inmate-manufactured weapon was found in his cell; Escarcega  
9 contended the weapon was his cellmate's. RT 30. In 1981, he received a disciplinary write-up  
10 for being in possession of money. RT 31. He received five CDC-128 counseling memoranda  
11 for lesser infractions. The most recent CDC-128 was in 2002 for an unexcused absence. RT 31.

## 12 13 2. The State Court Decision

14 The Los Angeles County Superior Court denied Escarcega's petition in a reasoned  
15 decision, finding some evidence to support the BPH's decision. Resp. Exh. 4. The court rejected  
16 the BPH's finding about the kidnapping, but nonetheless upheld the BPH's ultimate  
17 determination of unsuitability.

18 While certainly it appears that Petitioner planned to commit a robbery, the circumstances  
19 of the offense are not 'especially heinous, atrocious, or cruel,' such that that (sic) the  
20 offense could be described as 'dispassionate and calculated.' . . . Thus, there is no  
21 evidence to support the Board's conclusion. [¶] However, the Board also found Petitioner  
22 unsuitable because of a prior unstable social history. . . , previous record of violence . . . ,  
23 and because he lacks realistic parole plans, particularly related to work. . . . There is  
24 'some evidence' in the record to support each of those conclusions. [¶] The Court rejects  
25 Petitioner's argument that the Board failed to properly apply the considerations set forth  
26 in Penal Code § 3041. . . . The record reflects the Board considered Petitioner's positive  
27 institutional gains but found they did not outweigh the factors for unsuitability and that  
28 Petitioner would pose an unreasonable risk of danger to society or a threat to public  
safety if released from prison. . . . Thus, the Board did not abuse its discretion by denying  
Petitioner's parole.

25 Resp. Exh. 4, ¶. 1-2 (citations omitted).

1           3.     Analysis Of Federal Claim

2           The Los Angeles County Superior Court correctly identified the “some evidence”  
3 standard as the applicable standard for judicial review, as evidenced by its citation to In re  
4 Rosenkrantz, 29 Cal. 4th 616 (Cal. 2002), which had cited and adopted the Superintendent v.  
5 Hill some evidence standard as the proper standard for judicial review of evidentiary sufficiency  
6 for administrative cases. See Rosenkrantz, 29 Cal. 4th at 665-67. Because the Los Angeles  
7 County Superior Court’s decision is the last reasoned decision, that is the decision to which §  
8 2254(d) applies. See Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991); Barker v. Fleming, 423  
9 F.3d 1085, 1091-92 (9th Cir. 2005). The state court did not unreasonably apply Superintendent  
10 v. Hill.

11           The superior court's determination that the kidnapping was not "especially heinous,  
12 atrocious or cruel" does not mean that the kidnapping has no weight in the parole suitability  
13 calculation, but instead means that it alone would not support denial of parole at this point in  
14 Escarcega's sentence. Here, as the superior court noted, there were other factors supporting the  
15 determination that Escarcega was not suitable for parole. There was his unstable social history,  
16 i.e., membership in a gang, substance abuse and extensive juvenile delinquency. There was his  
17 history of violence, that included a robbery, an involuntary manslaughter, and an assault with  
18 attempt to commit rape. And there was his lack of realistic parole plans in that he had not firmed  
19 up his housing, had not lined up a job, and was looking for work at locations that would have  
20 involved an unreasonable commute from his intended area of residence.

21           Escarcega appears to argue in his traverse that he was a juvenile when he committed the  
22 kidnapping. See Traverse, ¶. 19-21. The probation officer's report states that he was born in  
23 1958, which would have made him about 24 years old when the crime was committed. His  
24 argument about adolescent misbehavior does not fit his facts. Some of his criminal activity did  
25 occur when he was a juvenile, but it continued into adulthood and worsened as he grew older.  
26 Thus, his is a particularly inappropriate case in which to view the crime as some sort of youthful  
27 indiscretion.

28           Bearing in mind that the court's chore is to consider not whether some evidence supports


1 the reasons, but whether some evidence supports the conclusion that his release unreasonably  
2 endangers public safety, this court concludes that there was some evidence to support the BPH's  
3 conclusion that Escarcega's release would pose an unreasonable risk of danger to society if  
4 released from prison in 2004, some 21 years into his life sentence. The Los Angeles County  
5 Superior Court's rejection of Escarcega's insufficient evidence claim was not contrary to or an  
6 unreasonable application of the Superintendent v. Hill some evidence standard. Escarcega is not  
7 entitled to the writ.

8  
9 **CONCLUSION**

10 For the foregoing reasons, the petition is denied. The clerk shall close the file.

11 IT IS SO ORDERED.

12 DATED: March 9, 2010

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15 SUSAN ILLSTON  
16 United States District Judge  
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